A **Edward Gella Baul & Ors (suing on behalf of themselves and 20 other claimants of native customary right land located in Sungai Geruyu/Sungai Ruyu, a tributary of Sungai Krian, Saratok, Sarawak) v Superintendent of Land and Survey & Ors**

B

HIGH COURT (KUCHING) — SUIT NO SRA-21NCvC-1/3 OF 2017 (HC)
CHRISTOPHER CHIN JC
C 27 JANUARY 2021

Native Law and Custom — Land dispute — Customary rights over land — Claim for — Whether the plaintiffs had exhausted all remedies before coming D *to High Court — Whether there was admissible evidence by plaintiffs to prove existence of cultivation and occupation of alleged customary land — Whether plaintiffs were entitled to claim for damages for alleged trespass of land by defendants — Whether there was credible corroborative evidence regarding ground facts establishing native customary rights in the disputed area*

E

The case was in respect of natives of Sarawak alleging that the State Government had through the Superintendent of Land and Survey alienated State land to a third party, the third defendant and where the plaintiffs claimed native customary rights ('NCR') over such State land now alienated. The F plaintiffs in their statement of claim in encl 183 sought in their representative capacity against the defendants a declaration order that the plaintiffs had acquired and inherited native title and NCR totalling 474 hectares of NCR land dome of which had been included in Lot 21 Block 16 Awik-Krian Land District ('Lot 21') while some of the NCR land contiguous and adjoining Lot G 21 had been trespassed upon and/or encroached upon and planted with oil palm by the third defendant. The plaintiffs sought for a declaration order that the area so included in the said title as claimed by the plaintiffs' as part of the plaintiffs' NCR land. The plaintiffs further applied an order that the third defendant to be made liable in the sum in the amount of RM51,760,800 as the H estimated amount of profit and income which the plaintiffs would have or could have obtained if the plaintiffs had not been deprived from planting, harvesting and selling oil palm fruit grown on the plaintiffs' NCR from the year 2005 to the year 2017. It was also contended that the forum to decide the nature of dispute was not the High Court but the District Native Court. The I plaintiffs further claimed for damages from the third defendant for trespassing the plaintiff's NCR. The plaintiffs further claim for NCR at Sungai Geruyu.

Held, dismissing the plaintiff's statement of claim in encl 3 and notice of application under encl 285 with costs of RM10,000 to each the first, second

and third defendants subject to allocator:

(1) There was an outright dispute between the natives (the plaintiffs included) over land claimed to be held under customary rights. The forum to decide this nature of dispute was not the High Court but the District Native Court. While it was clear that the High Court had wide jurisdiction to hear most matters, it was equally clear that parties must first exhausted all avenues or remedies prescribed by the legislation, if any, before coming to the High Court. The plaintiffs had not shown that they had exhausted the remedy provided by the Natives Customary Ordinance. The plaintiffs case and that of the fourth, fifth and seventh defendants failed on the issue of jurisdiction. The declaratory order sought by the plaintiffs was an equitable and discretionary remedy. The court could not make such a declaratory order if the plaintiffs had other alternative remedies but failed to seek such remedy s 41 of the Specific Relief Act 1950. The court ought not to grant such declaratory orders where there was a specific remedy and a specific tribunal expressly prescribed by a statute. The plaintiff must resort to that specific remedy and that specific tribunal for the relief prescribed by the statute that was s 5(3)(a) of the Native Courts Ordinance 1992 (see paras 29, 31 & 33–34).

(2) There was no evidence that the perimeter boundaries drawn in the plaintiff's maps was established by careful field inspection of the actual terrain to establish the existence of cultivation or occupation as mandated by the law for establishing the NCR. The plaintiff's map was not drawn by a licensed surveyor and was inadmissible by virtue of the Lands Surveyors Ordinance 2001 (see paras 39 & 43–44).

(3) The court could not accept the plaintiffs' computation of loss. It was based on revenues from sales at market values totally disregarding the profit derived from total sales minus production costs. There was no allowance for production and other expenditure. The third defendant could not be said to be trespassers when they were in fact the registered owners of the said Lot 21. If it was true that the alienated land had encroached upon NCR rights then the remedy of the natives was to compensation, provided such NCR could be proved based on law and the string of decided cases interpreting the enforcement and application. The plaintiffs' claim for damages and losses of trespass to the alleged NCR land was already statute barred as it was filed after the expiry of the limitation period prescribed in item 29 of the Schedule of the Limitation Ordinance Sarawak which was three years from the date of discovery of the alleged trespass in the year 2005 (see paras 58 & 60–62).

(4) There was no evidence adduced of facts of occupation and settlement gleaned from the site inspection that were subsequently and competently translated into the plaintiffs' map to delineate the 474 hectares of claimed

NCR. To establish NCR some after the cut-off date of 1958 represented a high and slippery slope for the native claimants to mount. The court could only decide based on credible admitted evidence sufficient to tip the burden of proof on a balance of probability in favour of plaintiffs and not to decide on the basis of sympathy. Neither could the court allow the plaintiffs' claim or prayers on the basis of oral history. Physical evidence of continued settlement and occupation required to be adduced to establish NCR. The testimonies of the plaintiffs were self-serving which carried little or no weight in the absence of some other credible corroborative evidence regarding ground facts establishing NCR in the disputed area (see paras 68–69 & 71–72).

(5) The third defendant could not be said to be trespassers when they were in fact the registered owners of the said Lot 21. The original provisional lease which eventually became Lot 21 was issued in the year 2000. Cultivation of the land commenced on the provisional lease only after the year 2000. In addition, the plaintiffs' claim for damages and losses for trespass to their alleged NCR land was already statute barred as the plaintiffs' claim was filed after the expiry of the limitation period prescribed in item 29 of the Schedule of the Limitation Ordinance Sarawak (Cap 49) which is three years from the date of the discovery of the alleged trespass in the year 2005. The claims by the plaintiffs against the first and second defendants were similarly barred by s 202 of the Land Code, s 2(a) of the Public Authorities Protection Act 1948 and the above provision of the Limitation Ordinance. Thus, the third defendant was not liable to the plaintiffs for trespass and the first and second defendants' act in alienating the land in Lot 21 which was presently registered in the name of the third defendant was devoid of wrongdoing vis a vis the plaintiff (see paras 60, 62–63 & 85–86).

[Bahasa Malaysia summary

Kes semasa adalah berkenaan dengan masyarakat asli Sarawak yang mendakwa bahawa Kerajaan Negeri telah melalui Penguasa Tanah dan Survei memberi milik tanah Negeri kepada pihak ketiga, defendan ketiga dan di mana plaintif menuntut hak milik adat masyarakat asli ('NCR') atas tanah Negeri tersebut kini diberi milik. Plaintif melalui pernyataan tuntutan mereka dalam lampiran 183 memohon melalui kapasiti representasi mereka terhadap pihak defendan satu perintah deklarasi bahawa plaintif telah memperoleh dan mewarisi hak milik masyarakat asli dan NCR seluas 474 hektar tanah NCR yang telah dimasukkan dalam Lot 21 Blok 16 Awik-Daerah Tanah Krian ('Lot 21') sementara sebilangan tanah NCR bersebelahan dan berdekatan Lot 21 telah diceroboh dan/atau dimasuki dan dengan kelapa sawit ditanam oleh defendan ketiga. Plaintif memohon perintah deklarasi agar kawasan tersebut termasuk dalam hakmilik tersebut sebagaimana yang dituntut oleh plaintif sebagai sebahagian dari tanah NCR plaintif. Plaintif selanjutnya memohon perintah

agar defendan ketiga dipertanggungjawabkan dalam jumlah sebanyak RM51,760,800 sebagai anggaran keuntungan dan pendapatan yang mana akan diperolehi atau mungkin diperolehi oleh pihak plaintif sekiranya pihak plaintif tidak dilucutkan hak penanaman, menuai dan menjual buah kelapa sawit yang ditanam di NCR plaintif dari tahun 2005 hingga tahun 2017. Ia juga dihujahkan bahawa forum untuk memutuskan sifat pertikaian bukanlah Mahkamah Tinggi tetapi Mahkamah Anak Negeri Daerah. Plaintif selanjutnya menuntut ganti rugi daripada defendan ketiga kerana menceroboh NCR plaintif. Plaintif selanjutnya menuntut NCR di Sungai Geruyu.

Diputuskan, menolak pernyataan tuntutan plaintif dalam lampiran 3 dan notis permohonan di bawah lampiran 285 dengan kos RM10,000 untuk setiap defendan pertama, kedua dan ketiga yang tertakluk kepada alokatur:

(1) Terdapat pertikaian secara langsung antara masyarakat asli (termasuk plaintif) atas tanah yang dituntut sebagai hak milik adat. Forum untuk memutuskan perselisihan ini bukanlah Mahkamah Tinggi tetapi Mahkamah Anak Negeri Daerah. Walaupun ianya jelas bahawa Mahkamah Tinggi mempunyai bidang kuasa yang luas untuk mendengar pelbagai perkara, ianya sama sekali jelas bahawa pihak-pihak harus terlebih dahulu mengggunakan kesemua jalan atau cara yang ditetapkan oleh undang-undang, sekiranya ada, sebelum ke Mahkamah Tinggi. Plaintif tidak menunjukkan bahawa mereka telah menggunakan kesemua remedi yang ditetapkan oleh Natives Customary Ordinance. Kes plaintif dan bahawa defendan keempat, kelima dan ketujuh gagal dalam isu bidang kuasa. Perintah deklarasi yang dipohon oleh pihak plaintif adalah satu remedi yang adil dan wajar. Mahkamah tidak dapat membenarkan perintah deklarasi tersebut sekiranya plaintif mempunyai remedy alternatif lain tetapi gagal memohon remedi tersebut di bawah Akta Relief Spesifik 1950. Mahkamah tidak seharusnya memberikan perintah deklarasi tersebut sekiranya terdapat remedi khusus dan tribunal khusus yang dinyatakan secara jelas oleh undang-undang. Plaintif mesti menggunakan remedi khusus tersebut dan tribunal khusus untuk relif yang ditetapkan oleh undang-undang yang merupakan s 5(3)(a) Native Courts Ordinance 1992 (lihat perenggan 29, 31 & 33–34).

(2) Tidak ada keterangan bahawa sempadan perimeter yang dilukis dalam peta plaintif telah dibuktikan melalui pemeriksaan tapak yang cermat pada rupa bumi yang sebenarnya untuk membuktikan wujudnya penanaman atau pendudukan sebagaimana diperlukan oleh undang-undang dalam membuktikan NCR. Peta plaintif tidak dilukis oleh juruukur berlesen dan tidak boleh diterima berdasarkan Lands Surveyors Ordinance 2001 (lihat perenggan 39 & 43–44).

(3) Mahkamah tidak dapat menerima pengiraan kerugian plaintif. Ianya

adalah berdasarkan pada pendapatan dari penjualan pada nilai pasaran yang sepenuhnya mengabaikan keuntungan yang diperoleh dari jumlah penjualan ditolak kos pengeluaran. Tidak ada peruntukan pengeluaran dan perbelanjaan lain. Defendan ketiga tidak boleh dikatakan sebagai penceroboh ketika mereka sebenarnya adalah pemilik berdaftar Lot tersebut 21. Sekiranya ia benar bahawa tanah yang diberi hak tersebut telah mencabuli hak NCR, maka remedy masyarakat asli adalah untuk pampasan ganti rugi, dengan syarat NCR tersebut dapat dibuktikan berdasarkan undang-undang dan beberapa kes yang diputuskan yang menafsirkan penguatkuasaan dan permohonan. Tuntutan plaintif atas ganti rugi dan kerugian pencerobohan terhadap tanah NCR yang telah didakwa telah dihadkan oleh undang-undang kerana telah difailkan setelah tamatnya tempoh had masa yang ditetapkan dalam perkara 29 Jadual Limitation Ordinance Sarawak yang mana tiga tahun dari tarikh penemuan pelanggaran yang didakwa pada tahun 2005 (lihat perenggan 58 & 60–62).

(4) Tidak ada keterangan yang dikemukakan mengenai fakta pendudukan dan penempatan yang diperolehi dari pemeriksaan tapak yang kemudiannya dan secara cekapnya diterjemahkan ke dalam peta plaintif untuk menggambarkan 474 hektar NCR yang dituntut. Untuk membuktikan NCR selepas tarikh akhir pada tahun 1958 menunjukkan cerun yang tinggi dan licin untuk didaki oleh masyarakat asli penuntut. Mahkamah hanya dapat memutuskan berdasarkan keterangan yang diakui yang dapat dipercayai yang cukup untuk mengatasi beban pembuktian pada imbangan kebarangkalian yang berpihak kepada plaintif dan tidak memutuskan berdasarkan simpati. Mahkamah juga tidak boleh membenarkan tuntutan atau permohonan plaintif berdasarkan sejarah lisan. Keterangan fizikal mengenai penempatan dan pendudukan yang berterusan perlu dikemukakan untuk membuktikan NCR. Pernyataan pihak plaintif hanya untuk diri sendiri yang membawa sedikit atau tiada pun berat dengan ketiadaan keterangan menyokong yang boleh dipercayai mengenai fakta asas yang membuktikan NCR di kawasan yang dipertikaikan (lihat perenggan 68–69 & 71–72).

(5) Defendan ketiga tidak harus dikatakan sebagai penceroboh sedangkan mereka sebenarnya adalah pemilik berdaftar Lot 21. Pajakan sementara asal yang akhirnya menjadi Lot 21 dikeluarkan pada tahun 2000. Penggemburan tanah dimulakan pada pajakan sementara hanya selepas tahun 2000. Di samping itu, tuntutan plaintif untuk ganti rugi dan kerugian kerana menceroboh tanah NCR yang mereka dakwa telah dihadkan oleh undang-undang kerana tuntutan plaintif difailkan setelah tamatnya tempoh had yang ditetapkan dalam perkara 29 Jadual Limitation Ordinance Sarawak (Cap 49) iaitu tiga tahun dari tarikh penemuan pencerobohan yang didakwa pada tahun 2005. Tuntutan pihak plaintif terhadap defendan pertama dan kedua juga dihadkan oleh

s 202 Kanun Tanah, s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 dan peruntukan di bawah Limitation Ordinance. Oleh itu, defendan ketiga tidak bertanggungjawab terhadap plaintif atas pencerobohan dan tindakan defendan pertama dan kedua dalam memberikan hak tanah di Lot 21 yang pada masa ini didaftarkan atas nama defendan ketiga tidak melakukan kesalahan terhadap pihak plaintif (lihat perenggan 60, 62–63 & 85–86).]

Cases referred to

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281, FC (refd)

Keliment anak Nyapong & Ors (suing for themselves and their parents and other siblings) v Usha Bina Sdn Bhd [2009] 1 MLJ 98, HC (refd)

Liaw v Blikas [1965] 2 MLJ 9 (refd)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, HC (refd)

SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors [2004] 4 MLJ 180, HC (refd)

Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors [2014] 7 MLJ 429, HC (refd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677, FC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256, CA (refd)

TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77, FC (refd)

Legislation referred to

Advocates Ordinance (Cap 110)
Courts of Judicature Act 1964 s 18(2), (3)
Evidence Act 1950 s 101
Land Code (Cap 81) ss 5, 5(2)(i), (2)(ii), (3)(a), (7), 6A, 10, 132, 202
Lands Surveyors Ordinance 2001 s 20
Limitation Ordinance (Cap 49) Schedule, items 29, 72
Native Courts Ordinance 1992 (Ord No 9/92) s 5, 5(3)(a)
Public Authorities Protection Act 1948 s 2(a)
Specific Relief Act 1950 s 41

Peli ak Aron (Peli Anak Aron Advocates) for the plaintiffs.
Hrrison ak Aris (State Attorney General's Chamber) for the first and second defendants.
Lim Swee Huat (SH Lim & Co) for the third defendant.

John Antau ak Linggang (Tang & Antau Co) for the fourth and fifth defendants. Andrew ak Winston Kaya (A Winston Kaya Advocates) for the seventh defendant.

Christopher Chin JC:

On 19 January 2021 following the conclusion of a long drawn trial, I ruled at Kuching High Court II that the plaintiffs' claim was not successful. The following are the grounds of my decision.

THE SUBSTANCE OF THE PLAINTIFF'S CLAIM

[1] Extracting from the endorsements of claim of the plaintiffs (encl 183), they sought in their representative capacity, against the defendants as follows:

(a) a declaration order that the plaintiffs had acquired and/or inherited native title and/or native customary rights ('NCR') totalling 474 hectares of Native Customary Right land some of which have been included in Lot 21 Block 16 Awik-Krian Land District ('Lot 21') while some of the NCR land contiguous and adjoining Lot 21 have been trespassed upon and/or encroached upon and planted with oil palm by the third defendant;

(b) a declaration that the native title and/or native customary rights land precludes the first, second and third defendants from impairing or abridging the plaintiffs' NCR land and/or from issuing any title or otherwise, which affects their said native title and/or rights;

(c) a declaration that the acts of the first and second defendants in issuing the said title in so far as they impair the plaintiffs' NCR land over the said NCR land, is wrong bad and/or void;

(d) a declaration order that the acts of the third defendant in encroaching and/or trespassing and planting oil palm on the plaintiffs' NCR land is wrong bad and/or void;

(e) a declaration order that the issuance of the said title by the first and seconddefendants to the third defendants in as far as the extent of that area under the title overlaps and/or covers the plaintiffs' NCR land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of the plaintiffs' NCR land over the said land;

(f) alternatively, a declaration that the issuance of the said title is subject to the native title and/or native customary rights land and/or usufructuary rights of the plaintiffs in or over the said NCR land and that they do not affect the plaintiffs' said title and/or rights therein;

(g) a declaration that in issuing the said title as aforesaid, the first and second defendants had acted in breach of their fiduciary duty to the plaintiffs and therefore the said title was null and void;

(h) a declaration that the issuance of the said title was in breach of the Statutory provisions of the Land Code Cap 81;

(i) a declaration that the issuance of the said title to the third defendant is unlawful, improper, unconstitutional and therefore null and void;

(j) a declaration order that the area so included in the said title as claimed by the plaintiffs' as part of their NCR land, the same be excised out the area of land under the said title;

(k) a prohibitory injunction restraining the third defendant and/or their employees, servant and/or agents from trespassing, clearing, planting harvesting and selling oil palm fruit, and/or using or occupying the plaintiffs' said NCR land immediately upon the order of the prohibitory injunction;

(l) a mandatory injunction against the third defendant and/or their employees, servants and/or agents to cease operations, planting, harvesting and selling oil palm fruit and to remove all structures, equipment and/or machineries from the plaintiffs' said NCR land forthwith immediately upon the order of mandatory injunction;

(m) an order that the third defendant be made accountable and/or reveal to the plaintiffs' the gross profit, which the third defendant had obtained from harvesting and selling oil palm fruit from the plaintiffs' NCR land from the year 2005 to 2017;

(n) an order that the third defendant be made liable for the claim or judgment, in the sum in the amount of RM51,760,800 being the estimated amount of profit and income which the plaintiffs' would have or could have obtained if the plaintiffs had not been deprived from planting, harvesting and selling oil palm fruit grown on plaintiffs' NCR from the year 2005 to the year 2017;

(o) alternatively, an order that the third defendant be made liable to pay to the plaintiffs the total sum equivalent to 60 per cent (60%) of the profit and /or income, which the third defendant had obtained or may have obtained, from planting, harvesting and /or selling oil palm fruit grown on plaintiff' NCR land from the year 2005 to 2017;

(p) exemplary damages; alternatively, aggravated accordingly;

(q) client and solicitors cost of RM85,000;

(r) out of pocket expenses incurred by the plaintiffs for transportation food and lodging costs expenses from 2005 to 2017 amounting to RM45,000; and

(s) such further and/or other relief this honourable court deems fit and just.

[2] Lot 21 which is the focus of the plaintiff's claim was alienated with a document of title by the first and second defendants and this title was eventually registered in the name of the third defendant.

TAKEOVER OF A PART-HEARD TRIAL

[3] This trial had earlier commenced before His Lordship (Datuk) Ravinthran Paramaguru (as he then was) who was then transferred out of Sarawak. When I resumed the trial I first recorded that all the parties had no objections to me continuing this trial as the presiding judge and I offered that, should they wish, they were at liberty to re-call any earlier witness who had testified before His Lordship Datuk Ravinthran. In this respect I proceeded with the trial by virtue of s 18(2) and (3) of the Courts of Judicature Act 1964 which states:

> (2) Whenever any judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another judge may —
>
> (a) Continue with the proceeding from the stage at which the previous judge left it and —
>
> (i) act on the evidence already recorded by the previous Judge; or
>
> (ii) act on the evidence partly recorded by the previous Judge and partly by himself; or
>
> (b) resummon the witnesses and recommence the proceeding.
>
> (3) Where the Judge acts under subparagraph 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take evidence afresh.

SOME PERTINENT BACKGROUND ON THE ORIGINS AND METAMORPHOSIS OF THIS SUIT

[4] At the outset it must be stated that the plaintiffs, the fourth, fifth and seventh defendants are made up of individuals of the Iban race. Their ethnicity was never disputed nor questioned. There was testimony that some of the witnesses were of the Seru tribe but at the same time it was conceded that the Seru had been assimilated over time into the Iban race.

[5] The background actions leading to this suit can be best described in the words of counsel for the third defendant and for the fourth and fifth defendants as extracted from p 333 onwards of the notes of proceedings. The following exchanges underlines the basis of the suits especially in relation to the competing claims not just by the plaintiffs against the third defendant but as between the plaintiffs and the multitude of their fellow natives amongst the fourth, fifth and seventh defendants. It also explains how the sixth and eighth defendants dropped out of the picture:

> DC3 Lim: I would like to assist to explain the issue of intervention by the 4th, 5th and 7th Defendants in this particular suit. Firstly, the 4th, 5th, 6th, 7th and 8th Defendants were Plaintiffs in the five other High Court Kuching suits instituted against the 3rd Defendant affecting the same subject matter land and it is noted from the five suits filed there are conflicting claims over the same land. Meanwhile this instant suit is the 6th suit against the 3rd Defendant affecting the same subject matter. Due to being hard press for time to meeting the Court's schedule of clearing cases and the fact that the 3rd Defendant was confronted with five suits and have to make monthly report to the Bursa Saham, they were constrained to settle the matter in respect of five High Court suits. It was one of the terms of the consent order entered in respect of the five High Court suits in Kuching that they shall intervene as Defendants in this particular suit and shall give indemnity to the 3rdDefendant in respect of any claim by this Plaintiff in this case and any other further claim over the same land. As a consequence of that consent order, the 4th, 5th, 6th and 7thand 8th Defendants become interveners and Defendants in this suit. Following the intervention, we discovered that the areas claimed by the 6th and 8th Defendants were outside the areas claimed by the Plaintiffs in this case. Hence, action against the 6th and 8th Defendants were discontinued. This is the reason for the intervention.
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> DC4–5 John: I also would like to enlighten the Court because we talk about this case has been brought by 4th, 5th, 6th and 7th Defendants to the Natives Court affecting the same area of land. In these natives suits the 4th, 5th and 6th Defendants they sued the 7th and 8th Defendants and the natives case at Saratok over the same dispute, over the same parcel of NCR land which is outside the Lot 21 Block 16. So the Natives Court suit was heard before the said Native Court at Saratok and a consent order was granted. The consent order dated 24th May 2017 stated that the Plaintiffs and the Defendants referring to the group led by Garan Anak Chunggut and the Defendant is Bajing Anak Imbing.
>
> (i) The Plaintiffs and Defendant are the beneficial co-proprietor of all the rights, estate and interest on and in the Native Customary Land in Plots A, B, C and D as shown in the map as attached herewith on a 50% : 50% undivided shares basis;
>
> (ii) The Plaintiffs and the Defendants are the beneficial co-proprietors of all the rights, estates and interest on and in the Native Customary Land in Plot F as shown in the Map as attached herewith on a 1/3: 2/3 undivided shares basis to the Plaintiffs and Defendants respectively.
>
> DC3 Lim: For convenience of Court reference to the two Natives Court Order can be found at pages 63–64, 66–67 of Encl 77.

DC4-5 John: This matter between the 4th, 5th and 7th Defendants over this land has been brought before the Native Court. That is why we become the intervener here while the five High Court suits is going on at that time.

Court: If award is made against the 3rd Defendant then the 3rd Defendant can get indemnity from you all.

DC3 Lim: That is one of the terms of the consent orders.

DC4–5 John: That is why we have to intervene.

Court: Is it correct what they have stated, Mr Peli? They read from the records, I don't think there could be any dispute.

PC Peli: There is no dispute as to two factors. There were five High Court suits, but before the High Court's suits the District Natives Court cases came first and in the District Natives Court the one significant point that caused us to challenge the decision was the Plaintiffs were not parties to that suit and before 2013 there was already meeting in District Office, so the initiative to take it to the District Natives Court were entirely behind and beyond the knowledge of the Plaintiffs.

Court: So why didn't the Plaintiffs way back in 2003 bring their claim to the Natives Court?

PC Peli: Because if you look at the dialogue there was some instruction from the Lands & Surveys Department that the NCR in Sungai Ruyu can only be applied for by the Ketua Masyarakat. But, let me point out the two suits

...

[6] And a little further on:

Court: What concerns me is whether this High Court has jurisdiction to determine the natives' rights.

PC Peli: That is an issue as well, but they prefer ... (Interjected)

Court: That is the declaration you are seeking from this Court, am I right? Are you sure you are in the right forum?

PC Peli: Yes, we are in the right forum. The two decisions in the District Native Court and High Court were made without any reference to the Plaintiffs and yet the Plaintiffs were involved with the 4th, 5th, 6th and 7thDefendants. It is not right for them to go behind the back of the Plaintiffs, at least they should have been informed. We are filling the case in the Natives Court, what do you want to do because we were all involved in this dispute in the first place.

[7] By virtue of the consent orders in the earlier suits the third defendant had entered into deeds of settlement to pay and had been paying periodical compensation to the fourth, fifth and seventh defendant. It was a condition of the deeds of settlement that if the third defendant loses the present case, the third defendant will be indemnified by the fourth, fifth and seventh defendant. Hence their intervening in this suit had a corollary aim to ensure that the plaintiff does not win this case.

THE CLAIM BY THE PLAINTIFFS IN SUBSTANCE IS AGAINST THE THIRD DEFENDANT

[8] In common with most native customary rights (NCR) cases that come to court it is in respect of natives of Sarawak alleging that the State Government has through the Superintendent of Lands and Survey alienated State land to a third party (the third defendant in this case) and where the plaintiffs claim NCR rights over such State land now alienated. The first and second defendants are the State Government and the land authority who alienated Lot 21 and which the third defendant eventually became the registered owner of.

THE LAW ON SARAWAK NCR CLAIMS IN BRIEF

[9] I will consider the evidence in this case principally against the backdrop of the law based on the provisions of statute as well as case law which has developed over time and which I understand represents the relevant law on native customary rights (NCR) claims as at the date this judgment.

[10] *Native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished*: *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (CA).

[11] *Native customary law existed and operated side by side with the Orders of the Rajah. Native customary rights are similar rights to those under native title of Australian Aboriginals … enforceable as common law rights* : *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 (HC).

[12] *No NCR rights can be created after 1 January 1958.* Section 5 of the Land Code (Cap 81) — Native customary rights:

> (1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land shall be given to any native customary rights over any land in Sarawak created *after the 1st day of January, 1958,* and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.
>
> (2) The methods by which native customary rights may be created are:

A
(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

B
(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for rights of way.

C
[13] *The claimants had to show proof that they had customary rights over the land. In examining the evidence as to the existence of the customary rights the court is mindful of the fact that the defendants must show either the customary rights have been in existence before 1 January 1958 and still subsisting or that the rights were created after 1 January 1959 pursuant to a permit issued under* s 10 of the Sarawak Land Code: *SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180

D

[14] *The question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January 1958*: s 5(2)(ii) of the Land Code Cap 81.

E

[15] *Land remains State land until document of title issued.* Section 5(2)(i) of the Land Code Cap 81, provided that:

F
(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

G
(ii) the question whether any such right has been created or has been lost or extinguished shall, save in so far as this code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

H

[16] *Burden on the native claimant to prove creation of NCR pre-1958.* Section 5(7) of the Land Code Cap 81:

Whenever any dispute shall arise as to whether any native customary rights exist or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights.

I

[17] *State can resume land with lawfully established NCR subject to compensation.* Section 5(3)(a) of the Land Code Cap 81:

Any native customary right may be extinguished by direction issued by the Minister ... and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government.

[18] *Occupation other than by settlement and cultivation was beyond protection. The doctrine of native title required the group to be in continuous occupation of the land in dispute*: *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (CA).

[19] *To satisfy the 'occupation' requirement, actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering*: *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (FC).

[20] *The pre-existence of rights under native laws and custom which the common law respects did not include rights to land in the primary forest which natives had not felled or cultivated but were forests which they reserved for food and forest produce.*

The rights of the native are confined to the area where they settled and not where they foraged for food was a correct statement of the law relating to the extent of native rights to land claimed under the NCR in Sarawak.

The High Court and the Court of Appeal were not entitled to uphold a claim for NCR to land in Sarawak based on the native custom of pemakai menoa or pulau. The law of Sarawak recognised in a claim for NCR was the custom or adat of temuda: *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 (FC).

(part of the above synopsis is extracted, with gratitude, from the seminar presented by Tan Sri Richard Malanjum (Former CJ) in a Webinar on 'Reflections on Director of Forest Sarawak v TR Sandah Ak Tabau' held on the 14 October 2020). In addition:

[21] *Any native community may, within a native territorial domain, claim usufructuary rights exercised and enjoyed by members of that community.*

Any such claim shall be made to the Superintendent in such form as may be provided by the Director with all evidence in support of such claim

Any area so claimed shall not exceed 500 hectares: s 6A of the Land Code Cap 81.

[22] *Indefeasibility — The registered proprietor of any estate in land except in cases of fraud, hold such estate or interest subject to interests noted on the Register but free from all other interests:* s 132 of the Land Code Cap 81 on indefeasibility of title.

THE TASK OF THE NATIVE CLAIMANTS/PLAINTIFFS

[23] The upshot of the above synopsis of the recent cases and legislation is that while the Sarawak law clearly recognises native customary rights (NCR), the native faces an uphill task to establish such right.

[24] This in due in part to, *firstly*, the cut-off date of 1 January 1958 to create NCR, and *secondly*, that NCR being currently restricted to the adat of Temuda whereby the native claimant must establish *continuous occupation or settlement* in the area in dispute.

[25] However by virtue of the Sarawak Land Code (Amendment) Ordinance 2018 there is now an inclusion of a new s 6A to the Land Code Cap 81 (see para 23) where a native community may, within a native territorial domain, claim usufructuary rights exercised and enjoyed by members of that community, and if approved be issued with a native communal title.

[26] The role of this court is to apply the law as it now stands and see if the evidenced adduced by the plaintiffs, on a balance of probability, support their claim for NCR.

NATIVE COURTS ORDINANCE 1992 ('THE NCO')

[27] At the commencement of the trial at Sri Aman I had expressed my disquiet particularly to counsel for the plaintiffs as to whether this court had jurisdiction to hear this case as a large part of this action involves competing or overlapping claims between natives over the same allegedly land held under NCR. Despite the wide and inherent powers of the High Court I was certain that the establishment or adjudicating of competing NCR rights must first be undertaken by a forum equipped with the understanding of the language, culture and practices of the native, in this case, the Iban race.

[28] From para [5] above it becomes immediately apparent that the effect of this suit is that the plaintiffs are fighting against the fourth, fifth, and seventh defendants as to who are the rightful owners of the NCR. One of the key issues in this case is who is/are the rightful claimants of the NCR land. All of them claim to be the rightful owners of the NCR. The plaintiffs are disgruntled with the consent orders by the District Native Court declaring the respective shares of the fourth, fifth and seventh defendants' share in the NCR. These consent

orders then formed the deeds of settlement entered into between the third defendants with the alleged NCR owners which resulted in such owners being paid periodically and somewhat handsomely by the third defendant.

[29] In short, there is an outright dispute between natives (the plaintiffs included) over land claimed to be held under customary rights. The forum to decide this nature of dispute is not the High Court but the District Native Court. By s 5 of the above NCO:

> 5(1) *A Native Court shall*, subject to section 28 [exceptions relating to criminal, family or syariah matters which are subject to their respective legislation], *have jurisdiction over* ...
>
> (3)(a) cases involving *disputes between* natives in respect of —
>
> (i) *any land held under native customary rights* or which is within a native communal reserve declared under section 6 of the land Code;
>
> (ii) ...
>
> (iii) Any right to inheritance under native customary law to any land held under native customary rights or within a native Communal Reserve,
>
> Shall be heard in the first instance by a District Native Court. (Emphasis added.)

[30] The NCO allows for appeals from the District Native Court to the Native Court of Appeal.

[31] While it is clear that the High Court has wide inherent jurisdiction to hear most matters it is equally clear that parties must first exhaust all avenues or remedies prescribed by legislation, if any, before coming to the High Court.

[32] In the case of *Liaw v Blikas* [1965] 2 MLJ 9 in relation to probate and administration the plaintiff there was applying to court for the revocation of the letters of administration issued to the defendant as it appeared that the defendant looked after the deceased's bilik and was solely responsible for the funeral feasts. The learned Justice Lee Hun Hoe (as he then was) ruled that there would appear to be no provision for challenging the decision of the probate officer by way of appeals to the courts and the plaintiff should have applied to the probate officer to revoke the grant.

At p 11(G) of the above judgment the learned judge stated succinctly as follows:

> Another reason why I refuse to make the order prayed for is because plaintiff has not exhausted the remedy provided under the Administration of Estates Ordinance. Under s 32 of the said Ordinance a probate officer has been given a discretion to revoke his grant of probate or letters of administration at any time on good cause being shown. *In my opinion plaintiff should only come to this court as a last resort, at least until he has exhausted that remedy provided by the Ordinance.* (Emphasis added.)

[33] The plaintiffs' claim over the third defendant's Lot 21 effectively is a competing claim of the NCR rights of the fourth fifth and seventh defendant embodied in the two consent orders issued by the District Native Court. The plaintiffs have not shown that they have exhausted the remedy provided by the above NCO. On this issue alone the plaintiffs case and that of the fourth, fifth and seventh defendants fail on the issue of jurisdiction.

See also *Keliment anak Nyapong & Ors (suing for themselves and their parents and other siblings) v Usha Bina Sdn Bhd* [2009] 1 MLJ 98 where the High Court has accepted the District Native Court's decision on ownership of NCR.

[34] In addition to the dicta of Justice Lee Hun Hoe (as he then was) (above) the *declaratory order* sought by the plaintiffs is an equitable and discretionary remedy. This court cannot make such a declaratory order if the plaintiffs have other alternative remedy but fails to seek such remedy (s 41 of the Specific Relief Act 1950). The court ought not to grant such declaratory order where there is a specific remedy and specific tribunal is expressly prescribed by a statute. The plaintiff must resort to that specific remedy and that specific tribunal for the relief prescribed by the statute that is s 5(3)(a) of the NCO (above). Section 41 of the Specific Reliefs Act 1950 has a proviso:

> PROVIDED that no Court shall make any such declaration where the Plaintiff being able to seek further relief than a mere declaration or title, omits to do so.

LOT 21

[35] This suit revolves essentially round the plaintiffs' claim that the first and second defendants had wrongfully excised their NCR land to be alienated eventually into land under a document of title registered in the name of the third defendant. The history of Lot 21 is not disputed and as elucidated by the third defendant as follows:

(a) on 30 March 2000, the 1st defendant issued the PL Lot 3 in favour of Kenyalang Resources Sdn Bhd (see exh D8 at pp 8–13 of encl 88);

(b) evidence has been furnished that the name of the registered proprietor is THP Saribas Sdn Bhd vide Instrument No L 944/2014 dated 5 May 2014;

(c) the said Lot 21 is the (Sarawak) Land Code title issued by the first defendant in favour of the third defendant to replace the provisional lease Lot 3 Block 16 Awik-Krian Land District, originally containing an area of 1,270 hectares, more or less, after perimeter and ground surveys were completed ('PL Lot 3'). A copy of the provisional lease PL Lot 3 is marked exh D8 (at pp 8–13 of encl 88);

(d) looking at the map of the boundaries of PL Lot 3 (exh D7 at p 7 of encl 88) and the boundaries of Lot 21 (exh D10 at p 17 of encl 88) it is

clear that a certain portions of PL Lot 3 has been carved out reducing the original land size of 1,270 hectares (in PL Lot 3) to 1,039 hectares (in Lot 21). The total reduced area is 231 hectares;

(e) the area that has been 'carved out' from PL Lot 3 are marked as Plots 'A', 'B', 'C', 'D' and 'E' as shown in the map marked Annexure 'X' (at p 90 of encl 77) which is annexed to the deed of settlement marked as exh D21(b) (at pp 77–94 of encl 77); and

(f) it is also not disputed that Plot 'F' shown in Annexure 'X' (at p 90 of encl 77) is unencumbered State Land.

THE AREA CLAIMED BY THE PLAINTIFFS — THE PLAINTIFFS' MAP

[36] The plaintiffs did not attach any map to the statement of claim.

The plaintiffs instead referred to and tendered in court maps marked exhs P1 and P2 (at pp 8 and 10 of encl 192) ('plaintiffs' map').

[37] The plaintiffs' claim is for 474 hectares of NCR land some of which was within the boundaries of the Lot 21.

[38] I had misgivings of the plaintiffs' map from the outset. It was established in evidence that while the source map was obtained from the Lands and Survey Department, the alleged perimeter boundary of the NCR area was marked out on the source map by the plaintiff's counsel in his office upon the instructions and guidance of the plaintiffs.

[39] There was no evidence that such perimeter boundaries drawn in the plaintiffs' Map was established by careful field inspection of the actual terrain to establish the existence of cultivation or occupation as mandated by the law (referred to above) for establishing NCR. Although plaintiff's counsel admitted to me he once worked with the Lands and Survey Department he is not a registered surveyor.

[40] The perimeter boundaries of the claimed NCR on the plaintiffs' Map had been more cogent had it been at least established with actual field work employing even the most basic surveying techniques such as a 'compass traverse' or a 'plane table survey', or at the very least to mark or plot the co-ordinates of the perimeter boundary with a hand held GPS (global positioning service) device.

[41] In the cross-examination of PW1 Rajit ak Kusau, one of the plaintiffs the somewhat lax manner of preparation the plaintiffs' map is apparent:

Q14. Do you know who prepared the map at pages 67 and 68?

A. It was taken from Lands & Surveys Department.

Q15. Who plotted or do marking and colouring features on the map at page 68?

A. It was done by us together with my lawyer.

Q16. Before preparing and plotting the features on the map at page 68, was there any ground survey made?

A. Before, yes.

Q17. Can you give the specific date?

A. I can't remember the date.

Q18. Can you give the year?

A. If I am not mistaken, 2013.

Q19. Are you one of the participants during the ground survey?

A. Yes.

Q20. Who else were with you during the survey?

A. All the 24 claimants.

Q21. During the ground survey is there any record made?

A. That I do not know because I am not the one who record.

Q22. Then who do the recording? Can you name them?

A. It was recorded by the four Plaintiffs, that is, Edward Gella Baul, Desmond Reynold Jemeni, Tatol @ Katol anak Tutom and Lengkong Anak Aba.

Q23. When you do the ground survey is there any other longhouses or kampung that you encountered?

A. No.

[42] Again in the case of PW3 Uju ak Empat on cross-examination:

Q356. How big is the size of three NCR lands you are claiming here.

A. We took the information from Lands & Surveys Department and we are claiming the NCR land of 474 plus hectares.

Q357. Since you say they are mixed NCR land, how big is the Pemakai Menoa, Pulau Galau andTemuda?

A. I don't know how big, but we get the information that the NCR land is 474 plus hectares from Lands & Surveys Department.

Q362. Before the making of the maps at pages 67 and 68 of Enclosure 63, is there any ground survey made?

A. We did not do the ground survey, but we know based on the maps that Lands & Surveys Department provided to us.

Q366. Refer you to pages 72 to 79 of Enclosure 63. Is this the ground survey or site inspection that you are referring to?

A. We did the site inspection.

Q367. Whom was with you at that time?

A. Our lawyer, Mr Peli Aron.

Q368. Who else was with you?

A. Edward Gella Baul.

Q369. Anymore?

A. TR Lengkong Anak Aba, TR Anau, TR Kartu, my mother Sundai Anak Aba, Sepani bin Omar and myself.

Q370. When was the site inspection?

A. I can't recall the date, it was in the year 2017.

Q372. During the site inspection is there any private land surveyor or land surveyor from Lands and Survey went with you during the site inspection?

A. No.

Q373. Among the participants during the site inspection, is there anyone of you have the knowledge on surveying?

A. No.

[43] The dates of the alleged site inspection by just these two witnesses contradict (2013 and 2017). There was no evidence adduced of the notes taken from the site inspection of the details of the settlement or cultivation and hence there is no evidence that what was discovered at the site inspection was translated into the plaintiffs' map.

[44] The plaintiffs' map was not drawn by a licensed surveyor and therefore by virtue of the Lands Surveyors Ordinance 2001 is inadmissible as evidence. Section 20 of this Ordinance provides that:

> No cadastral land survey or plan thereof shall be accepted or adopted for the purpose of the Code or any other written law unless it has been approved by the Director of Lands and Surveys or by other officer authorized by him to approve survey plan on his behalf.

[45] The plaintiffs' map prepared in such a manner does not corroborate any testimony of the plaintiffs' witnesses seeking to establish that they have been in continuous occupation of the 474 hectares, which is what Sarawak law requires. Bearing in mind that the burden is on the native claimant to prove creation of NCR pre 1958 — s 5(7) of the Land Code Cap 81, the doctrine of native title required the group to be in continuous occupation of the land in dispute — *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (CA).

[46] Whatever evidence the plaintiffs adduced to prove their interest in the 474 hectares, including evidence of their continuous occupation and/or maintenance of the land (see *TR Sandah*'s case), if any, has no nexus to how the perimeter boundary of the plaintiffs' map was ascertained and established.

[47] The substance of the plaintiffs' and of the fourth, fifth and seventh defendants adduced evidence to their respective rights to NCR are mere assertions. In *SOP Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180 it was held that:

> The burden is on the defendant to prove the existence of the native customary rights and if the court finds, on the affidavits' evidence, that the evidence is unsatisfactory and unconvincing, the court may reject the evidence, *To prove their claim of native customary rights the defendant must do so by cogent evidence, Bare assertions would not be sufficient* (see para 38); (Emphasis added.)

[48] Hence, whatever sympathy this court has for the plaintiffs, it remains a very tall order for this court to accept the plaintiffs' map as the basis to dispossess the third defendant, a registered owner of a document of title evidencing Lot 21, of the third defendant's registered and indefeasible interest in land. *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 decided that indefeasibility of title of the land prevailed over a NCR claim. In this case the third defendant is registered as the sole owner of alienated land in Lot 21. Such interest cannot be defeated by the plaintiff's NCR. See s 132 of the Sarawak land Code (Cap 81) conferring the registered owner of land with an indefeasible interest in land.

[49] Even if I am willing to disregard the fact that the plaintiffs' map was not signed off by a licensed registered cadastral land surveyor, the same map does not convince me or even comes close to link the actual area demarcated with evidence of continuous settlement and cultivation on the ground.

[50] It is a finding of fact by this court that in addition to the plaintiffs, the fourth, fifth and seventh defendants themselves did not adduce cogent evidence to prove their claim of NCR an the Sungai Geruyu area in the manner or requirement laid down by law and cases summarised in paras [9]–[22] above. The aim of the fourth, fifth and seventh defendants intervention in this case is to ensure the plaintiffs do not win so as not to jeopardise the lucrative benefits the fourth fifth and seventh defendants are receiving under the deeds of settlement entered into between themselves and the third defendant.

[51] More uncertainty arises from the identification of the 474 hectares claimed by the plaintiffs in that PW8 Edward Gella Baul himself testified that he did not know the exact location and cannot confirm the boundaries of the 474 hectares NCR land which the plaintiffs are now claiming (see Q/A945 and

Q/A 946, and, Q1009 and Q1010 of the Notes of proceedings) PW8 Edward Gella Baul testified that he obtained the map from the Lands and Survey Department, Betong with the land size of 474 hectares being given to him by DW2 David Laeng. However, DW2 David Laeng denied providing the said map together with the land size of 474 hectares to PW8 Edward Gella Baul (see testimony of PW8 at Q/A1447 to 1450 of the notes of proceedings).

SO WHERE EXACTLY IS THE 474 HECTARES CLAIMED BY THE PLAINTIFFS?

[52] The first and second defendants in paras 3 and 8 of their defence have pleaded that they have acted according with the law and that there is no NCR land within Lot 21 (pp 26–27 of encl 183). The third defendant in paras 4(d) and 5 of their defence (pp 30–31 of encl 183) pleaded that there are no NCR land within Lot 21.

[53] The exhs P1, P2, P7 and P10 are maps which were tendered into court during the trial which clearly showed that the alleged 474 hectares of NCR lands claimed by the plaintiffs are clearly outside the perimeter boundary of Lot 21.

[54] That being the case it is not possible to consider the plaintiffs' declaratory order that they have acquired and/or inherited native title and/or native customary rights (NCR) over 474 hectares of land *within* Lot 21.

THE THIRD DEFENDANT IS LIABLE FOR DAMAGES FOR TRESPASSING INTO THE PLAINTIFFS' NCR

[55] The plaintiffs are seeking damages from the third defendant for trespassing into their NCR.

[56] The plaintiffs claimed in para 20 of the statement of claim:

> (a) The Plaintiffs aver that 3rd Defendant have planted, harvested and sold oil palm fruit from the year 2005 to 2017 and has obtained income and/or profit estimated at RM 51,760,800.00 which legally should belong to the Plaintiffs.

[57] And then in para 21:

> (a) The monthly production of oil palm fruit or harvest of oil palm fruit (hereinafter referred to as Fresh Fruit Bunch or 'FFB') from 474 hectares of Plaintiffs land is estimated or approximately, at 1 metric ton per month per hectare. The estimated market selling price of FFB in 2005 right through to the year 2017, was estimated at RM700.00 per metric ton;

(b) The monthly production of FFB obtained or harvested from 474 hectares starting from the 1st year of harvesting in the year 2005 and for the period of 13 years (2005 to 2017) is 474 metric tons per month;

(c) Therefore the estimated total profit or income which the 3rd Defendant had or may have earned from the year 2005 to 2017 (a 13 years period) is calculated as follows:-

(i) Monthly production or harvest of FFB in 2005 from 474 hectares is 474 metric tons.

(ii) Current market price of sale of FFB monthly in 2005 to 2017 per metric tons was RM700.00.

(iii) Monthly profit from selling 474 metric ton is calculated as follows 474 x RM700.00 = RM 331,800.00 per month.

(iv) Per year profit is calculated as follows: RM331,800.00 x 12 months = RM3,981,600.00.

(v) Therefore, gross profit for sale of FFB for the period from year 2005 to 2017. A period of 13 years is calculated as follows:-

474 (metric tons) x 1 (1 month) x 12 (12 months) x 700 (market selling price) x 13 (13 years period from 2005 to 2017) is equivalent to:

474 x 1 x 12 x 13 x 700 = RM51,760,800.00 (Ringgit Malaysia fifty one million, seven hundred and sixty thousand and eight hundred).

[58] This court cannot accept the plaintiffs' computation of loss. This is because the formula above reveals a basic accounting flaw of the plaintiffs. The profit is calculated on the assumption that the cultivation, harvesting and sale of FFB (Fresh Fruit Bunch) does not involve any production costs at all. The claim above is calculated based on revenue from sales at market values totally disregarding that profit is derived from total sales less/minus production costs. Nowhere in the above formula is there allowance for production and other expenditure.

[59] The basis of the claim for this erroneous amount against the third defendant is twofold. Firstly it is alleged that the third defendant has trespassed upon the plaintiffs' NCR lands. Secondly, that the plaintiffs were negligent in that they failed to verify or confirm with the first and second defendants as to the existence of NCR land within the title before commencing clearing the land for cultivation.

[60] The third defendant cannot be said to be trespassers when they are in fact the registered owners of the said Lot 21. The original provisional lease which eventually became Lot 21 was issued in the year 2000. Cultivation of the land commenced on the provisional lease only after the year 2000.

[61] If it is true that the alienated land (Lot 21) had encroached upon NCR rights then the remedy of the natives is to compensation, provided such NCR can be proved based on the law and the string of decided cases interpreting its enforcement and application.

[62] In addition, the plaintiffs' claim for damages and losses for trespass to their alleged NCR land is already statute barred as the plaintiffs claim was filed after the expiry of the limitation period prescribed in item 29 of the Schedule of the Limitation Ordinance Sarawak (Cap 49) which is three years from date of the discovery of the alleged trespass in the year 2005.

[63] The claims by the plaintiffs against the first and second defendants are similarly barred by s 202 of the Land Code, s 2(a) of the Public Authorities Protection Act 1948 and the above provision of the Limitation Ordinance.

THE PLAINTIFFS' BASIS OF CLAIMS FOR NCR AT SUNGAI GERUYU

[64] As 1958 is some 62 years ago, all allegations of occupation and cultivation are necessarily hearsay or orally recorded history unsubstantiated by documentary proof where such proof would be unreasonable to require the native to produce in court today given the standard of literacy and availability of recording techniques in common practice in rural communities soon after World War II. As the law now stands, oral history is clearly insufficient. Cogent physical evidence of continuous settlement and cultivation up to the present is now required.

[65] By virtue of s 101 of the Evidence Act 1950, the burden is on the plaintiffs to prove its case:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[66] The plaintiffs had this to say as the basis of establishing continued occupation, settlement and cultivation of the 474 hectares (see para 1(c) encl 322):

> (a) the Plaintiffs' ancestors and descendants were originally Iban communities living in the longhouse in Kedap, Melupa Krian Saratok, Lubok Renit, Awik Krian Saratok and from 26 Karangan Klua, Saratok;
>
> (b) they moved to that area of Sg. Ruyu and created Native Rights Land in the areas delineated and marked as A, B, C and D as shown in the Sketch Map

Exhibit 'EGB-1(A)' and 'EGB-2(A)' attached. The Plaintiffs repeat the Particulars of the creation of the native customary rights of the Plaintiff as stated in Paragraphs 5(a) to 5(g) of the Plaintiffs Statement of Claim.

(c) the Plaintiffs ancestors and descendants from Kedap, Melupa cleared and built longhouses and farm in the area Sg. Anak a tributary of Sg. Ruyu. Some cultivation such as sago and coconut still exist today.

(d) Some of the Plaintiffs were born in Sg. Ruyu. They lived their early childhood in Sg. Ruyu and only left Sg. Ruyu because of the encroachment of the third Defendant;

(e) The area of Bukit Batu area marked 'A' in Exhibit 'EGB-18 2(A)' was used as a burial ground by the Plaintiffs. Several people who had died while occupying Sg. Ruyu were buried in the burial ground at Bukit Batu.

(f) Some of the Plaintiffs continue to farm padi in Sg. Ruyu until the year 2005. In 2005 the last remaining families of the Plaintiff had to leave Sg. Ruyu because the third Defendant started to plant oil palm and encroached into the Native Customary Rights of the Plaintiffs.

[67] These assertions, even if they are to be believed, falls short of the test to establish continuous settlement and cultivation mandated by the law as clarified by the several cases summarised in paras [9]–[22] above. This court was not presented with any clear believable or cogent present day factual evidence of settlements, crops cultivated or other ground facts to evidence the continuous settlement and cultivation of the 474 hectares since pre 1958.

[68] There is no evidence adduced of facts (of occupation and settlement) gleaned from the 'site inspection' that were subsequently and competently translated into the plaintiffs' map to delineate the 474 hectares of claimed NCR, as required by the tests laid down in the above decided cases.

[69] To establish NCR in the form of *temuda* now, some 60 years after the cut-off date of 1958, represents a high and slippery slope for the native claimants to mount.

[70] The plaintiffs' witnesses all appeared to me to be honest and sincere in giving their evidence. They did not hesitate in their answers and readily replied in the negative if they did not know the answers to the questions posed. This court does not for one moment doubt their honesty or their sincerity.

[71] However, this court can only decide based on credible admitted evidence sufficient to tip the burden of proof on a balance of probability in favour of the plaintiffs and not to decide on the basis of sympathy. Neither can this court allow the plaintiffs' claims or prayers on the basis of oral history. In *Sanabung ak Sampai & Ors v Hydroflow Sdn Bhd & Ors* [2014] 7 MLJ 429, it

was held that:

> In the instant case, the plaintiffs themselves have admitted that the other villagers, residents and headmen did not support their action. The validity of the claim of the relatively few plaintiffs from only three villages over a very large area was therefore thrown into doubt. *In conclusion, the claim for the vast area of 5,000 hectares purely based on the oral history related by some of the witnesses that their ancestors hunted in that said area was not convincing.* For the above reasons, the plaintiffs had not proved that they possessed NCR ... (Emphasis added.)

[72] It is evident from the string of cases that oral testimony is now not sufficient. Physical evidence of continued settlement and occupation required to be adduced to establish NCR. The testimonies of the plaintiffs were self-serving which carry little or no weight in the absence of some other credible corroborative evidence regarding ground facts establishing NCR in the disputed area (see *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 (CA).

PERTINENT ARGUMENTS BY THE FIRST AND SECOND DEFENDANTS

[73] The overlapping claims were sought to be resolved by a dialogue held on the 25 July 2013 but was not successful as the parties could not agree amongst themselves thus putting a halt to the governments initiative to survey land under NCR.

[74] The second defendant adduced through DW1 a series of aerial photographs taken both pre and post 1958. In essence these photographs do not support the plaintiff's claim of occupation/settlement or cultivation of primary forests at three disputed site for cultivation. These photographic evidence was not challenged by the plaintiffs.

[75] These photographs merit some discussion. This was post war leading survey technology very likely developed for combat reconnaissance purposes in the second World War. A light aeroplane would be equipped with a specially developed camera which would take continuously, very high resolution, overlapping images of the topography as the aeroplane flies along a pre-arranged grid and altitude of air-space, usually early in the morning when the weather in the tropics was usually stable and clear of cloud cover.

[76] When the photos are developed, two overlapping photos can be viewed together with a device called a 'stereoscope' which mimics the human eye and the vegetation and topography would be revealed in sharp detail and also in three dimension — ideal for mapping contours of hills and valleys. Rivers and

land cleared for cultivation including longhouses and other human structures will be revealed in sharp relief with astounding detail and clarity but in black and white.

[77] In short, the area claimed to be cultivated by the plaintiffs is not supported by the photographic evidence. Even if this court were to discount the requirement of actual occupation, temuda (clearing of primary forests for cultivation and settlement) is not supported by the photographic evidence.

[78] The first and second defendants argue that the action of the plaintiffs are time barred under s 2(a) of the Public Authorities Protection Act 1948 provides, paraphrasing:

> Any suit, action ... or other proceeding commenced ... for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglects or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action or proceeding shall not lie or be instituted unless it is commenced within thirty six months next after the act ...

[79] They further relied on item 72 of the Schedule to the Limitation Ordinance which provides a time limit of three years to 'cancel or set aside an instrument ...' from 'when the facts entitling the Plaintiff to have the instrument cancelled or set aside become known to him'.

[80] Section 202 of the Land Code Sarawak also barred the action of the plaintiffs now:

> No action for recovery of damages as aforesaid shall lie or be sustained against the Government unless the action is commenced within a period of three years from the date when the right to bring the action accrued.

CONCLUSION

[81] The plaintiffs have raised a myriad of issues in its detailed submission (see encl 322). However as the matters referred to in this judgment adequately deals with the substance of the claims by the plaintiffs I see no need to deal individually with the peripheral issues that were raised.

[82] Applying the law as summarised in paras [9]–[22] above to the facts of this case and the testimony of the myriad of witnesses it is my considered conclusion as follows.

[83] The plaintiffs have *not* proven that they are the owners of or have inherited NCR in the Sg Geruyu area overlapping and within Lot 21 and

measuring 474 hectares identified in the plaintiffs' map. The areas claimed by the plaintiffs are outside the boundaries of Lot 21. A

[84] Based on the same tests that were applied to the plaintiffs' claims, the fourth, fifth and seventh defendants have *not* proven their NCR interest in land identified as plots A to D and F in Annexure X (p 90 of encl 77). B

[85] It follows that the third defendant is not liable to the plaintiffs for trespass, or at all.

C

[86] The first and second defendants' act in alienating the land in Lot 21 which is presently registered in the name of the third defendant is devoid of any wrong doing vis a vis the plaintiffs. Even if it were, any liability would be defeated by limitations.

D

[87] The facts point to a dispute amongst the natives making up the plaintiffs, fourth, fifth and seventh defendants in respect of overlapping or competing claims of NCR lands in the Sungai Geruyu area. By statute, the District Native Court and not this High Court has, in the first instance, the sole and original jurisdiction to adjudicate on such claims. The plaintiffs themselves in encl 322 at para 6 has conceded to this conflict and overlapping claims. E

ORDER

F

[88] In the premises, the plaintiffs' statement of claim in encl 3 and their notice of application under encl 285 is dismissed with costs of RM10,000 to each the first, second and third defendants (only) subject to allocatur.

[89] The counterclaims of the fourth, fifth and seventh defendants are dismissed with no additional order as to costs. G

FINAL OBSERVATIONS

[90] Not only are there conflicting or overlapping claims. It emerged during the trial that many of the defendants had already been paid compensation for the resumption of their rights by the second defendant. In addition, in a fear of losing out, many defendants, either by themselves or by their spouses, relatives or children were named in more than one of the defendants named in this suit. This gives rise to a rather unsavoury conclusion of pure greed and this court is somewhat surprised that these blatant modus of claiming NCR, which tantamounts an abuse of court process, were allowed to proceed and continued by their respective counsels. H I

[91] It is not doubted that some of the defendants genuinely and in all sincerity believed they had established NCR as a matter of fact. Perhaps when they commenced this suit, their right to apply under the new s 6A of the Land Code Cap 81 for a native communal title within a native territorial domain was not known to them or they were not duly advised. The fact that a total of 231 hectares was excised out of the original provisional lease to Lot 3 in the issuance of the final Land Code Part II document of title for Lot 21 suggests that first defendant did conduct a survey to identify encumbrances such as the existence of NCR in the Sungai Geruyu area. Such natives would have greater certainty of bring their claims to fruition if they proceeded under s 6A which is the new initiative from the State Government of Sarawak to support legitimate NCR by the issuance, after due inquiry, of a native communal title for the natives within a native territorial domain.

[92] In coming to this decision I have disregarded the submissions of the counsel of the fourth and fifth defendant in toto as I have been notified that the counsel was not issued with a valid practising certificate under the Advocates Ordinance of Sarawak for the entire duration of 2020. This is most irresponsible and represents a grave prejudice to the fourth and fifth defendants. I view this as being improper conduct by committing unmitigated deception to clients and to court. I direct the Senior Assistant Registrar of Kuching High Court II to make a report of this fact to the Inquiry Committee constituted under the Advocates Ordinance for their consideration and action.

[93] In clarification:

(a) this decision has an impact on the two consent orders of the Native Court (that were issued with the consent of parties, and as conceded, without enquiry by the Native Court) leading into the entering of the deeds of settlement with the plaintiff. It is not within the pleaded case of the parties for this court to deal with the resulting consequences and aftermath of this decision; and

(b) the dispute in this case between the natives in relation to competing or overlapping NCR is for them to bring to the relevant Native Court to be adjudicated upon enquiry.

Order accordingly.

Reported by Mohd Kamarul Anwar